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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 50

CHARLES A. SHEPARD, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 594) and dissenting (R. 600) opinions in the Circuit Court of Appeals are reported in 62 F. (2d) 683. In connection with the denial of a petition for rehearing, additional opinions were rendered both by the majority (R. 635) and the minority (638) of the court. These opinions are reported in 64 F. (2d) 641.

JURISDICTION

The judgment sought to be reviewed was entered January 9, 1933. (R. 607.) The petition for rehearing was denied April 5, 1933. (R. 642.) The

petition for certiorari was filed May 8, 1933, and granted May 29, 1933. (R. 649.) Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Was the declaration of deceased that "Dr. Shepard has poisoned me" competent as a dying declaration?

2. Was the admission of the declaration of deceased that "she believed she was being poisoned" prejudicial, if not competent to rebut the theory of suicide, advanced by the defense?

3. If these declarations of the deceased were competent only as tending to show her state of mind to rebut the theory of suicide, as held by the Circuit Court of Appeals, was it error in the trial court to fail to restrict the evidence to that purpose in the absence of such a request by the defense?

4. Did the trial court abuse its discretion in excusing men on the jury panel who admitted they had read a three column article printed in a newspaper two days before the trial, which purported to emanate from the defendant, and to be his statement of the facts in the case?

5. Will this Court consider the contention that the trial court was unfair in its summary of the evidence in its charge to the jury, where no exception was made to the charge at its conclusion, but on the contrary, at the conclusion of the charge, coun-

sel for the defendant stated that the defendant was entirely satisfied with the instructions?

STATEMENT

The petitioner (hereafter referred to as the defendant) was convicted in the District Court of the United States for the District of Kansas under an indictment which charged him with murdering his wife, Zenana Shepard, on June 15, 1929, at Fort Riley, Kansas, a United States military reservation, by administering to her a poison known as bichloride of mercury. (R. 1–2, 26.) The jury having added to their verdict the words "without capital punishment," the court sentenced the defendant to imprisonment for the period of his natural life. (R. 30.) Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the defendant's conviction was affirmed, one judge dissenting. (R. 593–642.)

As the defendant does not now contend that the evidence was insufficient to warrant the submission of the case to the jury, it would serve no useful purpose to summarize the testimony. A summary appears in the majority opinion below at pages 595–598 of the record. That opinion discloses not only that the defendant practically conceded in the Circuit Court of Appeals that Mrs. Shepard's death was caused by mercury poisoning (R. 597), but that the evidence was so convincing as to give the jury ample justification for its finding that the defendant administered the poison.

ARGUMENT

One of the theories of the defense was that Mrs. Shepard committed suicide.[1] To establish this defense the defendant introduced various statements made by the deceased prior to her last illness to the effect that she did not care to live and contemplated taking her own life. (R. 405, 421, 483, 489, 497.) The defense also introduced certain statements made by the deceased during her last illness which indicated that she did not desire to get well. (R. 361, 372, 486, 489.)

In rebuttal the Government recalled two of its witnesses, Clara Brown, a nurse who attended Mrs. Shepard during practically the entire period of her fatal illness (R. 137–138, 342, 565), and Sergeant J. C. Gresser, who was in charge of a laboratory at Fort Riley and who made certain blood tests during Mrs. Shepard's illness. (R. 134, 136, 539.) Nurse Brown testified that on the second day she was on the case (about two days after Mrs. Shepard was taken ill) she had a conversation with Mrs. Shepard in which the latter said that "Dr. Shepard has poisoned me." (R. 562, 565.)[2]

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[1] See hypothetical question addressed to a defense witness at R. 403.

[2] Mrs. Shepard was taken ill on the evening of May 20, 1929. (R. 137, 422.) We think it is a fair inference from the testimony that Nurse Brown arrived on the case shortly after midnight of May 20. (R. 56–57, 137, 423.) It would appear, therefore, that Mrs. Shepard made the statement to Nurse Brown quoted above on May 22, 1929.

Sergeant Gresser testified that on the fourth or fifth day of Mrs. Shepard's illness Mrs. Shepard told him that "she believed she was being poisoned." (R. 540.)[3] These statements of the deceased were admitted as evidence over the objection of the defendant, and their admission constitutes the principal question in dispute. The majority below held that they were not admissible as dying declarations but were admissible for the purpose of disproving a state of mind disposed toward suicide. They also held that the defendant had waived the right to have the jury consider the statements only for this limited purpose by failing to request an instruction and by stating that the charge was entirely satisfactory.

I

THE DECLARATION MADE BY THE DECEASED THAT "DR. SHEPARD HAS POISONED ME" WAS COMPETENT AS A DYING DECLARATION

While the trial Judge, when admitting the declaration made by the deceased that "Dr. Shepard has poisoned me," did not say upon what ground he was admitting it, yet the record shows that the court admitted it as a dying declaration because the foundation was laid at that time for its admis-

[3] The material portions of the testimony of Sergeant Gresser and Nurse Brown with reference to these conversations is set forth in the defendant's supplemental brief. See Pages 3–5 for testimony of Sergeant Gresser; pages 7–11 for testimony of Nurse Brown.

sion as a dying declaration. We think it was competent as a dying declaration. While the question is not free from doubt, we are of the opinion that the Circuit Court of Appeals was in error in holding that it was not competent as a dying declaration, on the ground that there was no evidence that she believed death was impending or about to ensue, though she believed she would not recover.

The majority of the Circuit Court of Appeals, in holding that the statement was not competent as a dying declaration, put their ruling on the ground that "there is no evidence that she believed death was impending or about to ensue." (R. 598.) We are of the opinion that the evidence shows that she believed death was impending.

If the court below meant by "impending" that the belief must be that death is going to follow immediately, then we submit that this is not the proper test. In the brief of the defendant filed in this Court, the defendant takes this position.

We think the better rule is that the declarant must believe that death is impending in the sense that it is not distant—it is not necessary that he believe that he is going to die immediately, but he must have had no expectation of surviving the injury.

The test is whether all hope of life has been abandoned so that the person making the statement believes death is certain and impending. If the statement is made at a time when the deceased has a hopeless expectation of death, that is, the deceased

has abandoned all hope of living, then the declaration is competent as a dying declaration.

We submit that the evidence showed that Mrs. Shepard believed her death was certain and impending at the time the statement was made. She said she was not going to get well; that she was going to die. In what stronger words could she have expressed her belief as to the certainty of death and that it was impending? She then said her husband had poisoned her. It cannot be successfully argued that the declarant must state that she believes she is going to die immediately or in any specified time. She knew she had been poisoned and the uncontradicted evidence shows that she was stricken suddenly ill, and that for a day or two and just prior to making the statement to the nurse, she had been suddenly rendered blind, the pupils of her eyes were widely dilated, there was no reaction to light, she was very ill and delirious. Knowing that she had been poisoned and having been for a day or two in this condition, may we not conclude when she said she was not going to get well and was going to die, that she not only believed death was certain but was impending, though she could not know just how long it would take the poison to do its deadly work. The trial Judge who had to pass upon the competency of the statement as a dying declaration was, we submit, justified in holding that it was competent, because the evidence showed that she believed death was

certain and impending, and that she had a hopeless expectation of death and had abandoned all hope of living.

"No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances." Wigmore, *Evidence* (2d ed.), § 1442.

In *Mattox* v. *United States,* 146 U.S. 140, 151, this Court said:

> Dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed * * * * * * But it must be shown by the party offering them in evidence that they were made under a sense of impending death. This may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted, being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him.

The Court further said (pp. 151–152).

> In *Regina* v. *Perkins,* 9 C. & P. 395, the deceased received a severe wound from a gun loaded with shot, of which wound he died at five o'clock the next morning. On the evening of the day on which he was wounded, he was told by a surgeon that he could not

> recover, made no reply, but appeared dejected. It was held by all the judges of England that a declaration made by him at that time was receivable in evidence on the trial of a person for killing him, as being a declaration *in articulo mortis.*

When this case was again before this Court (156 U.S. 237) Mr. Justice Brown speaking for the Court, said (p. 244):

> They [dying declarations] are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the Chief Justice when this case was here upon the first writ of error, (146 U.S. 140, 152,) the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath.

In *Carver* v. *United States,* 160 U.S. 553, it appeared that the fatal wound was inflicted on March 25, 1895, and death occurred May 19, 1895. A declaration in writing in respect of the circumstances attendant upon the commission of the act, made by the deceased March 27, 1895, was admitted in evidence, against objection, as made under a sense of impending death. The testimony of the clerk of the court (Wheeler) to the effect that the deceased, after she was brought to Fort Smith, on April 14, 1895, said that her former statement was true, was

admitted subject to an exception because no proper foundation was laid for its admission.

The Court said (p. 555):

> The deceased received the fatal wound March 25, and her statement of March 27, 1895, was admitted as a dying declaration. The interview with Wheeler was on or after April 14, 1895, and whether she then spoke under the admonition of her approaching end or anticipated recovery does not appear.
>
> It has been held that a declaration is admissible if made while hope lingers, if it is afterwards ratified when hope is gone, *Reg.* v. *Steele,* 12 Cox C.C. 168, or if made when the person is without hope, though afterwards he regains confidence. *State* v. *Tilghman,* 11 Ired. Law, 513; *Swisher* v. *Commonwealth,* 26 Grattan, 963; 1 Greenl. Ev. (15th ed.) § 158, note *a.* But the repetition of a dying declaration cannot itself be admitted as a reiteration of the alleged facts if made when hope has been regained. * * * *

In *State* v. *Tilghman,* 11 Ired. Law 513, the North Carolina Supreme Court said (p. 551):

> It is not necessary, that the person should be *in articulo mortis,* (the very act of dying); it is sufficient if he be under the apprehension of impending dissolution * * *.

When the *Carver* case was before this Court on a second appeal (164 U.S. 694), the Court said (pp. 695, 697):

> Dying declarations are an exception to the general rule that only sworn testimony can

> be received, the fear of impending death being assumed to be as powerful an incentive to truth as the obligation of an oath. * * *
>
> * * * * * *
>
> They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent. * * *

In a note in 86 American State Reports 660, it is said:

> But while he must believe that death is impending in the sense that it is not distant: *Kilpatrick* v. *Commonwealth,* 31 Pa. St. 198; it is sufficient if he believes it to be approaching and certain, and the better holding is that he need not believe that he would die immediately: *Dunn* v. *State,* 2 Ark. 229, 35 Am. Dec. 54; *State* v. *Sadler,* 51 La. Ann. 1397, 26 South. 390; *State* v. *Keenan,* 38 La. Ann. 660; *State* v. *Newhouse,* 39 La. Ann. 862, 2 South. 799; *State* v. *Nash,* 7 Iowa, 347. As was said in *State* v. *Sullivan,* 20 R.I. 114, 37 Atl. 673, it is only necessary that the declarant should have had no expectation of surviving the injury inflicted by the defendant.

In Ruling Case Law, Volume 1, page 538, it is said:

> While the rules concerning the admissibility of dying declarations require that such declarations, to be admissible, must be made *in extremis,* it is not necessary that the de-

> clarant should apprehend immediate and instant dissolution. It is sufficient if he apprehends it to be impending and certain. In other words, the true test is whether all hope of life has been abandoned so that the person making the statement believes that death must follow. And the rule requiring that the declarations, to be admissible, must have been made while the declarant was in extremis does not mean that they must have been made while he was literally breathing his last; the rule is satisfied when it is shown that he died as the result of the injury from which he was suffering at the time when they were made. Hence it is not necessary to the admission of dying declarations that the declarant should have indicated that he believed that he would die within a definite time. It is enough that he was conscious of impending and certain death, and that he did die soon after making the declarations, as it is the impression of impending death, and not the rapid succession of death in point of fact, which renders the declarations admissible.

A number of cases are cited in support of the text.

In *State* v. *Moore*, 165 La. 163, 164, the court said:

> * * * it was immaterial that the deceased might have believed that he would survive until next morning, for "it is not necessary to prove expressions implying ap-

> prehension of *immediate* danger, *if it be clear that the party does not expect to survive the injury,* which may be collected from the general circumstances of his condition. [Italics ours.]" *State* v. *Sadler,* 51 La. Ann. 1397, 1412, 26 So. 390, 396, citing Wharton's Crim. Ev. § 261; *State* v. *Newhouse,* 39 La. Ann. 862, 2 So. 799; *State* v. *Keenan,* 38 La. Ann. 660.

In *State* v. *Sullivan,* 20 R.I. 114, the trial court, in ruling upon the admissibility of the deceased's statement, had said that "To make it admissible the man should have apprehended *immediate* death" (italics ours), but the Supreme Court of Rhode Island said (p. 119):

> This was even more favorable to the defendant than he was entitled to, because it was not necessary that the deceased should have apprehended *immediate* death in order to render his declarations admissible; *but only that he had no expectation of surviving the injury inflicted by the defendant.* Am. & Eng. Ency. L. vol. 9, pp. 679–82 and cases cited. (Last italics ours.)

See also *Evans* v. *State,* 58 Ark. 47, 54; *Hunter* v. *State,* 54 Tex. Crim. Rep. 224, 229; *Evans* v. *State,* 209 Ala. 563, 564.

The English authorities also support the view that the declarant need not apprehend immediate death. An interesting discussion of this question is in *Rex* v. *Perry* [1909], 2 K.B. 697 (also reported

in 2 Cr. App. Rep. 267), where the Court of Criminal Appeal said:

> The expression "at the point of death" which is there used [in *Rex* v. *Woodcock*, 1 Leach C.C. 500] has given rise to some misapprehension, and in *Reg.* v. *Osman* Lush L.J. said that there must be a settled hopeless expectation of "immediate death." We are of opinion that the presence or absence of expectation on the part of the declarant of immediate death is not the true test as to whether a statement as to the cause of death is admissible or not. Death must be imminent, but the material point is that the statement must be made when every hope of life has gone from the person making the statement. We think that that principle has been recognized in the later cases, to one or two of which we desire to call attention. In *Reg.* v. *Peel* Willes J. said: "It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant." That sentence expresses in very clear and crisp language the rule which I have been trying to explain. In *Reg.* v. *Gloster* Charles J., after examining the cases and citing *Rex* v. *Woodcock*, *Reg.* v. *Peel*, and *Reg.* v. *Osman* (where Lush L.J. used the expression "immediate death"), and after expressing his view that the word "immediate" might be misunderstood, said: "The whole of the facts must be looked at from first to last; and I may say before I refer to the evidence in detail that it goes no further than this: that

the woman thought that she was dying, thought that she would not recover, but in my judgment—and it is a most difficult thing to form a judgment of what was passing through the mind of this unfortunate woman—she did not entirely give up hope. And unless I can come to the conclusion that every hope was extinguished and gone I cannot admit the statement." It is also desirable to read a passage in the earlier part of the judgment in which Charles J. referred to the reasons why he differed from Lush L.J. He said: "In the latest case of all (*Reg.* v. *Osman*) Lush L.J. lays down the principle in these terms: 'A dying declaration is admitted in evidence because it is presumed that no person who is immediately going into the presence of his Maker, will do so with a lie on his lips. But the person making the declaration must entertain a settled hopeless expectation of immediate death. If he thinks he will die to-morrow it will not do.' That is the judgment of Willes J. with this addition, that Lush L.J. inserts the word 'immediate' before death, and goes on to say: 'If he thinks he will die to-morrow it will not do.' With the greatest deference to the latter very learned judge I would rather prefer to adopt the language of Willes J. and say that the declarant must be under a 'settled hopeless expectation of death.' 'Immediate death' must be construed in the sense of death impending, not on the instant, but within a very very short distance indeed. These are the principles

that have been laid down and are to guide me in the exercise of my judgment." In other words the test is whether all hope of life has been abandoned so that the person making the statement thinks that death must follow. In our opinion that is the true principle.

* * * * *

We are of opinion that the right view is that in determining whether a declaration is admissible in evidence the judge at the trial ought to consider whether the death of the deceased was imminent at the time the declaration was made and to determine from the language used by the deceased whether the statement was made at a time when the deceased had "a settled hopeless expectation of death." In the present case, if the expression "I shall go" is taken alone, it might mean I shall die some day; but, taking into consideration the whole sentence, we concur with the opinion of Lawrance J. that the statement was made by the deceased with the hopeless expectation of death. By the expression "hopeless expectation of death" I mean that the deceased had abandoned all hope of living. The statement is therefore admissible as a dying declaration made by her. * * *

See also *Rex* v. *Austin* [1912], 8 Cr. App. Rep. 27.

The fact that Mrs. Shepard did not die for some days after she made the dying declaration, does not render it incompetent. In the *Carver* case the fatal wound was inflicted on March 25, the dying

declaration which this Court held admissible was made on March 27, but death did not occur until May 19. In other cases also declarations have been admitted where the period of survival was considerably longer than in the instant case. *State* v. *Crane,* 120 N.C. 601 (5 months); *Boulden* v. *State,* 102 Ala. 78 (2 months); *State* v. *Robertson,* 162 La. 641 (2 months); *Walker* v. *State,* 88 Tex. Crim. Rep. 389 (6 weeks); *State* v. *Hall,* 134 S.C. 361 (33 days); *Jackson* v. *Commonwealth,* 189 Ky. 68 (27 days).

There can hardly be any doubt, in view of the testimony of Mrs. Shepard's nurse, that the deceased made the statement under the belief that death was a certainty, and that there was no hope of recovery. The nurse testified that in the conversation in which the statement was made, Mrs. Shepard said "she was not going to get well", and that "she was going to die". "Afterward and at different times," according to the nurse, Mrs. Shepard repeated the statement that she was going to die, and at no time did she express any idea to the nurse that she was going to get well. (R. 563.) Witnesses for the defense had also previously testified as to similar statements. (R. 486, 497–498.)

While one of the doctors who attended Mrs. Shepard during her last illness testified that he saw Mrs. Shepard on May 21, 1929, the day before her statement to nurse Brown was made, and that it was his impression from her general condition that "she was not dangerously ill at that time," he also

stated that he did not have "the slightest idea what was the matter with her" (R. 63), and it does not appear that he communicated to Mrs. Shepard his impression of her condition. The important factor is not what someone else may think of the declarant's condition, but what he, himself, thinks of his condition. See *Mattox* v. *United States,* 146 U.S. 140, 152; *Commonwealth* v. *Lockett,* 291 Pa. 319.

If either the majority or the dissenting judge below considered the statement of the deceased to Nurse Brown defective as a dying declaration on any other ground than that already discussed, they did not indicate it in their opinions. Moreover, the majority was careful to state that the declaration of the deceased to Sergeant Gresser was not admissible as a dying declaration for several reasons.

It would obviously be impossible to exhaust all the subjects of controversy which may arise in connection with the admissibility of a statement whose introduction in evidence as a dying declaration is being defended. We have considered one of the grounds which would affect the admissibility of the statement to Nurse Brown as a dying declaration; we think the statement also meets the various other limitations which have been prescribed by the authorities. The statement was made by Mrs. Shepard on her death bed; its introduction in evidence was sought in a prosecution for felonious homicide in which the death of the one who made the declara-

tion was in question (*Taylor* v. *Commonwealth*, 122 Va. 886; *Holland* v. *State*, 126 Ark. 332); it concerned only the facts immediately attending the act or at least one of the acts[4] which resulted in Mrs. Shepard's death (*Carver* v. *United States*, 160 U.S. 553, 554, *supra*; *State* v. *O'Shea*, 60 Kan. 772; nothing intervened, so far as the record shows, to prevent Mrs. Shepard from making as full a statement as she desired to make; in other words, her statement was complete and not fragmentary (*State* v. *Patterson*, 45 Vt. 308, 313; *State* v. *Nettlebush*, 20 Iowa 257); and the testimony does not disclose that in making the statement the declarant was motivated by any such feeling of hatred or revenge as would destroy the guarantee of trustworthiness.[5] *Reeves* v. *State*, 106 Miss. 885.

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[4] There was medical testimony indicating that there may have been several administrations of poison (R. 70, 127). Mrs. Shepard's statement refers to an administration of poison on the night of May 20, 1929, the night she was taken ill. The evidence does not disclose just when the subsequent administration occurred.

[5] There is nothing in the record, so far as we can find, to indicate that Mrs. Shepard had any knowledge of the carefully concealed affection of her husband for another woman. There does not appear to be any basis therefore for the statement of the dissenting judge in his second opinion that Mrs. Shepard "knew that she had lost the affection of her husband." (R. 641.) In fact the defendant, when taken into custody, expressly stated to agents of the Department of Justice in a stenographically reported interview that he and his wife had loved each other; that they had never had any trouble of any consequence; that they both had been true to

The statement by the deceased that her husband poisoned her was a statement of a fact and not her opinion

While the Circuit Court of Appeals held (R. 598), we think rightly, that the statement of the deceased to Sergeant Gresser that "she believed she was being poisoned" was a mere statement of opinion and not one of fact, it made no such holding with reference to the declaration of the deceased to Nurse Brown that "Dr. Shepard has poisoned me." Further, although the defendant moved to strike out the former statement on the ground referred to (R. 540), no similar motion was made in respect of the latter statement. (R. 565.)

The defendant now contends that Mrs. Shepard's declaration to the nurse was not a statement of a fact but an opinion or conclusion. We do not dispute the general proposition that only the declarant's statements of fact and not his opinions or conclusions are admissible. (See numerous cases cited in Wigmore, *Evidence*, 2d ed. (§ 1447). The difficulty lies in the application of the principle. Some of the decisions have applied the Opinion Rule to dying declarations with the same degree of strictness as in the ordinary case where the witness is available to make a complete exposition of the facts, thereby

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each other; that he never told anybody that he or his wife ever considered divorce because neither had planned any such thing; and that his home life had been entirely normal (R. 323–324).

rendering any inference by him unnecessary.[6] Other courts recognize the peculiar situation applicable in the case of dying declarations and make the rule serve its rational purpose, the exclusion of statements founded wholly on speculation or conjecture.

Of course, in determining whether a dying statement is one of fact or merely one of opinion, not only the statement itself but the other evidence must be considered, but it has also been ruled that if it does not definitely appear either from the statement or the evidence that the statement is one of opinion, it should be admitted, leaving to the jury the question of the weight to be accorded the statement. *Jones* v. *State,* 52 Ark. 345, 347; *State* v. *Clemons,* 51 Iowa 274; *State* v. *Arnold,* 13 Ired. Law (N.C.) 184; *Lipscomb* v. *State,* 75 Miss. 555. The decision of the trial judge should be sustained unless clearly unsupported by the evidence. *Newberry* v. *State,* 68 Ark. 355, 359; *Klehn* v. *Territory,* 1 Wash. 584.

There could seem to be no question that the statement of Mrs. Shepard that her husband

[6] In connection with his survey of the cases, Wigmore states (2d ed., § 1447) that the Opinion Rule is by some courts applied in connection with dying declarations "with more than the ordinary absurdity of results found in the use of that rule; some of the rulings, in their pedantic technicality, are a scandal to any system of Evidence supposed to be based on reason and common sense". "Are not some of these exclusion-rulings equal to any of the medieval witch-formulas and conjurers' spells, as a means of getting at the truth"?

poisoned her was on its face a statement of fact. As was said of a similar expression in *Shenkenberger* v. *State,* 154 Ind. 630, 639:

> Such expression is no more the statement of an opinion than are the declarations, "He shot me," "He murdered me," "He butchered me," "He cut me," which have been held admissible in many cases. * * *

And, to use the language of another case, "Any process of reasoning which seeks to distinguish between the statement, "Dr. Lipscomb poisoned me with a capsule he gave me tonight," and "Dr. Lipscomb killed me or shot me," seems to be a refinement * * * too uncertain and visionary to serve in the practical administration of justice, * * *." *Lipscomb* v. *State,* 75 Miss. 559, 603, *supra.*

Not only was Mrs. Shepard's statement on its face a statement of fact, but we believe that the other evidence discloses definitely that it was not a product of guess or fancy but had a substantial basis. The record shows that prior to the introduction of Mrs. Shepard's statement, a Major DuFrenne, one of the doctors who attended Mrs. Shepard during her last illness, had testified as follows (R. 339):

> I had a conversation with Major Shepard the day of the funeral as to how his wife took sick.
>
> Q. Tell the jury what it was.
>
> A. Major Shepard called me to his quarters the day of the funeral, and he told me

> that Mrs. Shepard had been downtown the day of her illness, and, when she came home, she looked very tired, and he said, in substance, like this: he said "Dear, you certainly are tired, are you not?" and he said, "Would you not like a ginger ale highball?" I do not know what Mrs. Shepard said, but anyway, Major Shepard said, he fixed her a drink at that time.

This testimony was corroborated by the testimony of Kathryn McCoskey, a sister-in-law of the deceased. She testified as follows (R. 339):

> When I arrived at Junction City, I had a conversation with Major Shepard about how Mrs. Shepard took sick.
>
> A. (Continuing) He told me that, the day of her illness, on the 20th, she came back from Junction City, she was very tired, and he asked her if she would like a highball, and she said she would, and he fixed her a drink, and she lay down on the couch, and he went in the other room, and heard a crash, and he came in, and she was picking things out of the air, and she was delirious.

Although the defendant when he took the stand denied that he had fixed Mrs. Shepard a drink just before she was taken ill (R. 422), it is significant that neither of the above witnesses was cross-examined by the defendant with reference to this matter and that the record does not disclose any motive for either witness to tell anything but the truth.

It is, therefore, evident that one of the facts that Mrs. Shepard knew when she made the statement

that her husband had poisoned her was that the accused had fixed her a drink before she became ill. The other facts which she knew are disclosed by the testimony of Nurse Brown (R. 564–566). They are essentially these: On the night she became ill Mrs. Shepard took a drink out of a bottle which the testimony indicates was customarily kept on a closet shelf in the defendant's room. It did not taste good. It tasted altogether different from a previous time when she had taken a drink out of the same bottle. She also knew that there could be little liquor remaining in the bottle, because she had remarked to Major Shepard when she took the preceding drink that there was only enough left for one more drink. The nurse testified that there was only about a tablespoonful of liquor in the bottle. Mrs. Shepard also knew that she became violently ill after she took her last drink out of this bottle. Further, as there was no testimony to indicate that anyone beside the defendant was with her at the time she took this drink, a fact which could have been easily proved by the defendant, it must also have been evident to Mrs. Shepard that if she did not poison the drink the defendant must have done so. Coupled with these facts is the fact that the medical testimony showed so conclusively that Mrs. Shepard's death was caused by the administration of poison that that fact, according to the majority opinion in the Circuit Court of Ap-

peals, was practically conceded in that court. (R. 597.)

While the testimony recited does not supply all the details with reference to Mrs. Shepard's poisoning, we believe that the trial judge would not have been justified in concluding upon the evidence before him that Mrs. Shepard's statement that her husband had poisoned her should be excluded from the jury as one based merely on speculation or conjecture. If such a statement, based on facts within the knowledge of the declarant like those recited, may be regarded as a statement of opinion rather than one of fact, it is hard to imagine a dying declaration in a poisoning case which would survive the Opinion Rule.

While there are some decisions supporting the view that a statement such as that of Mrs. Shepard's is a statement of opinion (*Berry* v. *State,* 63 Ark. 382; *Commonwealth* v. *Griffith,* 149 Ky. 405; *Mathedy* v. *Commonwealth,* 14 Ky. L.Rep. 182), the majority of the decisions are the other way. *Shenkenberger* v. *State,* 154 Ind. 630, *supra; State* v. *Kuhn,* 117 Iowa 216; *Cook* v. *State,* 90 Tex. Crim. Rep. 424, 426; *Rice* v. *State,* 49 Tex. Crim. Rep. 569; s.c. 54 Tex. Crim. Rep. 149; *Fults* v. *State,* 83 Tex. Crim. Rep. 602, 604; *Lipscomb* v. *State,* 75 Miss. 559, *supra.* See also *Simons* v. *People,* 150 Ill. 66, 73; *Puryear* v. *Commonwealth,* 83 Va. 51, 53; *People* v. *Green,* 1 Denio 614 (N.Y.); *State* v. *Ferrell,* 12 Richardson 321 (S.C.); *Copeland* v. *State,* 58 Fla. 26, 29.

Mrs. Shepard was mentally competent at the time she made the statement that her husband had poisoned her

It is also contended by the defendant at some length that the statement of the deceased to Nurse Brown was untrustworthy because the evidence shows that the declarant was mentally incompetent at the time it was made. We submit that if the evidence be considered as a whole it is not susceptible of this construction. Mrs. Shepard's statement to Nurse Brown was, according to her testimony, made on the second day she was on the case. (R. 562.) Mrs. Shepard was taken ill on the evening of May 20, 1929. As the nurse arrived on the case shortly after 12 o'clock that evening, it is evident that the declaration referred to was made on May 22.[7] At the very beginning of her illness it is undoubtedly true that Mrs. Shepard was delirious, incoherent, mentally confused, and in a state of collapse, but, according to most of the testimony, this condition rapidly cleared up. While one of the doctors who attended Mrs. Shepard indicated that the condition of mental confusion continued to some extent at least for about a week (R. 356), another doctor, who was called in on the morning of May 21st, testified that even then Mrs. Shepard was recovering from the state of collapse which marked the commencement of her illness on the night before. While there was still a slight

[7] See footnote 2.

mental confusion, it "could be penetrated, that is, she (Mrs. Shepard) would answer intelligently if you repeated your questions." (R. 63.) The mental condition, according to Nurse Brown, cleared up in "just a few days" and Mrs. Shepard was then as intelligent as anyone. (R. 137–138.) The most significant testimony, however, is the testimony which this nurse later gave in relating the conversation in which Mrs. Shepard made the statement that her husband had poisoned her. This was the only testimony which was addressed specifically to Mrs. Shepard's mental condition at that time. Nurse Brown testified that Mrs. Shepard's mind was then normal, she answered questions intelligently, and was perfectly rational. (R. 562–563.) Her testimony is amply corroborated by the intelligent character of the conversation between the nurse and Mrs. Shepard as revealed by the record. We think there was ample evidence to justify the court in concluding that Mrs. Shepard was mentally competent when she made her statement. It is well settled that the trial judge's decision as to the competency of a witness should not be disturbed unless clearly wrong. See *New York Evening Post Co.* v. *Chaloner,* 265 Fed. 204 (C.C.A. 2d); *District of Columbia* v. *Armes,* 107 U.S. 519.

The defendant stresses the fact that Nurse Brown failed for some time to tell anyone of Mrs. Shepard's statement that her husband had poisoned

her, but of course that did not affect the competency of the evidence but merely its credibility.

II

THE ADMISSION OF THE STATEMENT OF THE DECEASED THAT "SHE BELIEVED SHE WAS BEING POISONED" WAS NOT PREJUDICIAL

Whether competent or not, we contend that the defendant was not in any wise prejudiced by the admission of the statement of the deceased to Sergeant Gresser that "she believed she was being poisoned." The Circuit Court of Appeals held that this declaration was not a statement of fact and was not admissible as a dying declaration, but was admissible to show a state of mind not disposed toward suicide.

According to the majority opinion, it was practically conceded in the Circuit Court of Appeals that the death of Mrs. Shepard was due to poisoning. (R. 597.) The statement to Sergeant Gresser was, at most, a mere expression of the deceased's belief that she was poisoned. Neither the statement itself nor any of the testimony of Sergeant Gresser with reference to the conversation in which the statement was made connected the defendant, either directly or indirectly, with the statement. In view of the fact that it was practically conceded that Mrs. Shepard's death was due to poisoning and of the direct accusation made by the deceased to Nurse Brown that her husband had poisoned her, there was obviously no damage to the defendant

from the Gresser statement. If there was error in the admission of this statement, we submit that it did not operate to the prejudice of the defendant, and that it should be disregarded as a technical error not warranting reversal. Section 269 of the Judicial Code, as amended (U.S.C., Title 28, Sec. 391); Section 1025, R.S. (U.S.C., Title 18, Sec. 556); cf. *Hagner* v. *United States*, 285 U.S. 427.

III

WERE THE DECLARATIONS OF THE DECEASED AS TESTIFIED TO BY WITNESSES BROWN AND GRESSER COMPETENT AS TENDING TO SHOW THE STATE OF MIND OF THE DECEASED TO REBUT THE THEORY OF SUICIDE, AND WAS IT ERROR TO FAIL TO RESTRICT THE EVIDENCE TO THAT PURPOSE?

If, as we contend, the declaration made to the nurse was admissible as a dying declaration and the admission of the statement made to Gresser was not prejudicial, then this question becomes immaterial.

This question was the subject of extended discussion in the Circuit Court of Appeals. We have found nothing of substantial value to add to this discussion.

IV

THE ACTION OF THE COURT IN EXCUSING MEN ON THE JURY PANEL WHO ADMITTED THEY HAD READ A THREE-COLUMN ARTICLE PRINTED IN A NEWSPAPER TWO DAYS BEFORE THE TRIAL, WHICH PURPORTED TO EMANATE FROM THE DEFENDANT, IS NOT GROUND FOR A NEW TRIAL

The defendant contends that the trial court committed reversible error in excusing ten prospective

jurors who had read a three- or four-column newspaper article which appeared two days before the trial in the Kansas City Star, and which purported to emanate from the defendant and to be his statement of the facts of the case. This article is not included in the record, but one of the jurors who was examined by the court, as well as by counsel for both parties, testified that he thought it was a statement coming directly from the defendant about the details of the case, and that a person would consider the statement in determining the weight to be given the Government's testimony (R. 39–40). The other excluded jurors were examined solely by the court. Requests by the defendant to question several of the jurors were denied. The examination of the jurors in question appears at R. 38–49. At the conclusion of the examination the defendant moved to quash the entire panel (R. 49–50).

The defendant does not deny that the examination and acceptance or exclusion of jurors are matters entrusted to the sound discretion of the trial court; but contends, primarily, that that discretion was abused in the instant case because the trial court excluded the jurors without finding that they had gathered from reading the newspaper article an opinion favoring the defendant which was incapable of being removed by the evidence.

The Government as well as the defendant is, of course, entitled to a fair trial. The view of the trial court was that such a fair trial would not follow in the instant case if the defendant was

permitted to "put his statement in a newspaper and get it to all the jurors, and ask those jurors to sit in this case." (R. 45.) A juror should stand absolutely impartially between the parties. As this Court said in *Connors* v. *United States,* 158 U.S. 408, 413, 414, quoting from an earlier opinion by Chief Justice Marshall in *Mima Queen* v. *Hepburn,* 7 Cranch 290, 297:

> It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice. Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable. Yet they ought to be superior to every exception, they ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way, and therefore the court exercised a sound discretion in not permitting him to be sworn.

So, in the instant case, assuming that it might not have been entirely improper to have permitted the jurors in question to have been sworn, it certainly cannot be considered an abuse of the trial court's discretion to exclude jurors who have been

subjected to an influence in favor of the defendant which the jurors would naturally assume he had created. We submit that the defendant has failed to make such a showing of abuse of discretion as would entitle him to a new trial. As was said by this Court in *Holt* v. *United States,* 218 U.S. 245, 248:

> The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds* v. *United States,* 98 U.S. 145. *Hopt* v. *Utah,* 120 U.S. 430. *Spies* v. *Illinois,* 123 U.S. 131. * * *

See also *Assaid* v. *United States,* 10 F. (2d) 752, 754 (C.C.A. 4th); *Remus* v. *United States,* 291 Fed. 501, 507 (C.C.A. 6th), certiorari denied, 263 U.S. 717.

Moreover, as the newspaper article in question does not appear in the record, it is impossible to determine its effect. The trial court had the article before it and was in a position to know just what influence it would have upon a prospective juror. Under the circumstances, the case is peculiarly one in which the discretion of the trial judge should be considered final.

In any event, we cannot see how the defendant was in any wise prejudiced by the exclusion of the jurors in question. He makes no contention that the jury which tried him was not a fair and im-

partial jury. He was, of course, entitled to nothing more. As was said by this Court in *Howard* v. *Kentucky*, 200 U.S. 164, 173–174:

> Nor can we say that the discharge of Alexander took from the other jurors who had been chosen their competency to try the case or to give to plaintiff in error the right to a new panel. In *Hayes* v. *Missouri*, 120 U.S. 68, it was said "the accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert*, 116 U.S. 642. The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained." *Brown* v. *New Jersey*, 175 U.S. 172.

V

THE CONTENTION THAT THE TRIAL COURT IN ITS CHARGE TO THE JURY MADE CERTAIN UNFAIR COMMENTS ON THE EVIDENCE IS WITHOUT MERIT.

Defendant contends that reversible error resulted because the court in its charge reviewed the evidence for the Government in more detail than that favorable to the defense. As explained by the court below, it was but natural that the trial court should review the evidence for the Government at greater length because of the fact that the Government was required to sustain its burden of proof by circumstantial evidence. (R. 600.) It should be pointed out, however, that the trial court was careful in its charge frequently to admonish the jury

that it should consider and weigh all the testimony and that whatever comments the court should make upon the evidence were not in any wise binding upon the jury. (See R. 576, 578, 581, 583, 588, 589.) Consequently, there was no basis upon which to predicate a claim of reversible error. As was said by this Court in *Allis* v. *United States,* 155 U.S. 117, 124:

> So far as respects the complaint that the court stated part of the testimony on a certain point without stating all, we know of no rule that compels a court to recapitulate all the items of the evidence, nor even all bearing upon a single question. There was no intimation that all the testimony bearing upon any particular point was stated. On the contrary, the plain declaration was that there was other testimony than that mentioned, and the jury were admonished to give that not mentioned as full and careful consideration as that mentioned.

See also *Nudd* v. *Burrows,* 91 U.S. 426, 439; *Wiborg* v. *United States,* 163 U.S. 632. The charge contained no appeal to prejudice or passion and, considered as a whole, was eminently fair and considerate of the rights of the defendant. Cf. *Starr* v. *United States,* 153 U.S. 614.

The defendant also contends that the trial court in its charge to the jury commented unfairly upon the evidence. The instances cited are, we submit, devoid of merit. In commenting upon the evi-

dence, for example, the trial court stated that "From that time on until the date this murder is alleged to have been committed [the defendant], remained in the Medical Corps of the United States Army," etc. (R. 583.) The defendant says that this indicated to the jury that its proper finding on the evidence was murder. Obviously, the trial court was doing no more than repeating the charge made by the indictment. In any event, considering the charge as a whole, the jury could not have been misled, for prior to the comment of the court of which complaint is made, the following instructions were given (R. 577, 578, 581, 583):

> Now, the finding of this indictment by the grand jury is no evidence of the guilt of the defendant. It is a legal charge against him of having committed that crime. To that charge he has pleaded not guilty, and that created the issue which you are called here to determine. * * *
>
> * * * * * *
>
> In your deliberations in the jury room you must not allow passion, prejudice or partiality to influence you in the slightest degree in deciding upon your verdict, but you must be guided by the law as given to you by the court and the evidence of witnesses given in your presence.
>
> The law presumes the defendant to be innocent of the charge made against him and this presumption of innocence continues to operate in his favor throughout the trial and

until the contrary is proven by the evidence and until each and every ingredient necessary to constitute the offense charged against him is proven by the evidence beyond a reasonable doubt.

* * * * *

The burden of proof rests upon the government to prove to your satisfaction beyond a reasonable doubt each and every ingredient of the offense charged in the indictment, and this burden of proof does not shift from the government to the defendant at all, in any phase of the case. The burden of proof rests upon the government to prove his guilt and not upon the defendant to prove his innocence.

* * * * *

Now, it is within the court's province to comment on the evidence, but whatever comments I make are in no way binding on you in your deliberations because, as I have heretofore stated, you are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony and whatever comments I make are made for whatever help they may be to you in deciding the issues in this case.

And following the remarks complained of the court instructed as follows (R. 588, 591):

If you do find that Zenana Shepard, the deceased, died from the effects of mercurial poisoning, then the question remains did the defendant, Charles A. Shepard, administer

this poison to her as he is charged with doing in this indictment?

In answering this question you will of course properly consider all of the evidence in this case. Circumstantial evidence of course is the only kind of evidence you have as to the administration of this mercury, if it was administered, and it is from that kind of evidence you will have to decide whether or not this defendant is guilty of administering this poison to the deceased, if it was administered.

* * * * *

It is your duty to consider these instructions as a whole. You should not pick out any part thereof and consider it singly and alone, but you should consider and construe each part in the light of and together with all the other instructions given, and so considered and construed they embody the law of the case. You are to consider the evidence as given to you from the witness stand and if counsel on either side, or if the court has in any way misquoted or misinterpreted the evidence you will disregard the misquotation and misinterpretation and rely entirely upon your recollection of the evidence as given to you on the witness stand.

Complaint is also made of the two questions the court told the jury they were called upon to solve, viz (R. 585):

Did this woman die of mercurial poisoning, and secondly,

> Did the defendant, Charles A. Shepard, administer the mercury to her as charged in the indictment?

It is claimed that the above statement precluded the jury from finding that she died from some other cause. This complaint overlooks the indictment charge, viz., that she died from mercury poisoning and that it was administered by defendant. (R. 1–2.) The questions stated by the court were therefore the sole questions to be determined by the jury. If the jury found that she did not die from mercurial poisoning, it was no function of theirs to determine the exact cause of death.

Moreover, it appears that the defendant not only did not take an exception to the charge but stated at the conclusion of the charge that he was "entirely satisfied with the instructions." (R. 574.) It is well settled that objections to a charge will not be reviewed unless exception is taken before the jury retires. This principle has become so well established that it has been embodied in the rules of this Court as well as those of practically all of the Circuit Courts of Appeals, including the court below. Rule 8 of this Court provides:

> No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required *before the jury retires* to state distinctly the sev-

> eral matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions. (Italics ours.)

The purpose of the rule is to give the trial court opportunity to correct the alleged error to which exception is taken. *Allis* v. *United States,* 155 U.S. 117, 112; *Burns* v. *United States,* 274 U.S. 328, 336. The rights of the defendant in the instant case were fully protected by the charge as given, and there is, we submit, no occasion for a relaxation of the general rule.

CONCLUSION

For the reasons stated above, we submit that the judgment below should be affirmed.

Respectfully submitted.

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